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No. 283

In the Supreme Court of the United States

OCTOBER TERM, 1968

JOHN LOWELL HANNAH, JOHN JERALD HANNAH, AND BILLY ARCH HARDAWAY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–2a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1968. A petition for rehearing was denied on June 11, 1968. The petition for a writ of certiorari was filed on July 11, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the issue of entrapment was properly submitted to the jury.

316-047—68

STATEMENT

After a jury trial in the Northern District of Texas, petitioners were convicted on two counts of an indictment which charged that on December 21, 1966, they possessed and transported liquor not in stamped containers in violation of 26 U.S.C. 5205(a) and 5604(a), and that they removed from the place of manufacture and storage 750 gallons of distilled spirits on which the tax had not been paid in violation of 26 U.S.C. 5601(a)(12). On June 19, 1967, petitioner John Lowell Hannah was sentenced to four years' imprisonment and each of the other two petitioners was sentenced to one year's imprisonment.

The evidence showed that Alcohol Tax Agent Smith went with an elderly area native named McKinney to the home of a neighbor of petitioners in Pickens, Oklahoma. They told the neighbor they were interested in buying moonshine whiskey (R. 128, 254). Agent Smith pretended to be a relative of McKinney and said that he was driving and hauling whiskey because the older man was blind and could not drive (R. 49). Two weeks later, on November 9, 1966, the neighbor introduced the agent and his companion to petitioner Hardaway (R. 256). Agent Smith purchased six cases of moonshine whiskey from Hardaway for $180 (R. 256). Petitioner John Lowell Hannah is Hardaway's father-in-law (R. 14), and lived nearby (R. 262). A week later, when Agent Smith and McKinney returned to the area, they met the senior Hannah and he sold them three cases of moonshine whiskey from the Hardaway residence for $90 (R.

264). Two more sales to Agent Smith were made thereafter during this November-December 1966 period (R. 227).[1]

At the first meeting with Agent Smith, petitioner John Lowell Hannah mentioned that he had "a stash of 3,000 gallons" (R. 15, 263). At subsequent meetings he said he had sold 1,500 gallons of his supply (R. 16), and, later, that he no longer had the balance of his supply but was producing about 180 gallons per day (R. 17–18). At the mention of the 3,000 gallon quantity, Agent Smith replied that he could not handle that much himself but would check in El Paso (R. 15, 263). Hannah offered to supply any amount wanted and assured Smith of the high quality of the whiskey (R. 21, 266). A few days later Hannah stated that he wanted to consummate a sale of a large quantity (R. 267) and that his son, petitioner John Jerald Hannah, a former truck driver, would haul the load if a large sale were made (R. 271). On this occasion Agent Smith was not accompanied by McKinney (R. 267).

On December 11, 1965, the senior Hannah and Agent Smith drove to Dallas and met with Agent Cerda, then using the name of Jones (R. 25). Agent Cerda told Hannah that he was the field representative of a Chicago syndicate in the market for good moonshine whiskey (R. 73) and that delivery was wanted before Christmas (R. 86). The two agents told Hannah that they wanted to see the distillery, to determine if it had a capacity to produce the 900 gal-

[1] These sales were the subject of pending federal prosecutions in Oklahoma (R. 307).

lons promised (R. 27). They accompanied the senior Hannah back to Oklahoma, but he refused to take them to the distillery (R. 31). He told them that, since he was to make delivery without benefit of an advance payment, there was no reason for anyone to want to see the distillery (R. 35). Hannah agreed to deliver 900 cases for $43 per case (R. 43).[2]

On December 21, 1966, using a rented truck, the three petitioners brought 750 gallons, contained in 125 cases, from Oklahoma to the Dallas, Texas area where they were apprehended (R. 43).

All three petitioners testified. Young Hannah said he participated in the transportation to Dallas for the money involved (R. 237). Petitioner Hardaway said he was motivated by sympathy for McKinney who was old and had met with financial reverses (R. 174, 177, 189). He did not know who was to receive the money from the 750 gallons brought to Dallas (R. 189). The senior Hannah related that his son-in-law, Hardaway, had asked him to help McKinney because Hardaway felt sorry for the old fellow (R. 199). Before meeting McKinney or Agent Smith (R. 215, 221), he had happened to meet a supplier named "Jack" (R. 204), and, although not in the liquor business (R. 199), he had bought ten cases from Jack (R. 221). Hannah claimed he paid cash for the cases (R. 224) as well as for the 125 cases, at $25 a case, which he later brought to the Dallas area (R. 221,

[2] Hannah said he was interested in increasing production and wanted the syndicate to furnish aids such as a radio, a truck, police sentry dogs, sugar and jars (R. 28, 51, 76, 77, 85).

228). He was unemployed during this period but testified he had saved approximately $4,000 (R. 222, 228).

In his opening statement the defense counsel stated to the jury, "we anticipate, that the court will instruct you what constitutes an unlawful entrapment * * *" (R. 10), and, later, "when this evidence has been completed and you study the instructions * * * under the law they will be entitled to an acquittal at your hands" (R. 11–12). The court at the conclusion of the trial instructed the jury on entrapment (R. 285–286). The defense counsel stated that there was no defense objection to the instructions (R. 291).

ARGUMENT

Contrary to their trial strategy of seeking to have the jury pass on the issue of entrapment, petitioners now claim that the issue was one of law for the trial judge to decide. That the issue is one for the jury where the facts are in dispute was settled by this Court in *Sherman* v. *United States,* 356 U.S. 369. There is no occasion to reconsider that decision.

The evidence clearly did not establish entrapment as a matter of law. At trial, petitioners offered some slight evidence that they were induced, because of sympathy, to commit the offenses charged. The government's evidence indicated that petitioners were in the bootleg whiskey business and that the government officers merely afforded petitioners an opportunity to carry out a transaction. If the question of entrapment depends upon credibility factors or inferences drawn

from conflicting evidence, it presents a question of fact for resolution by the jury. *Hattem* v. *United States,* 283 F. 2d 339, 342 (C.A. 9), certiorari denied, 365 U.S. 812. See *Sherman* v. *United States, supra,* 356 U.S. at 377.

There is no conflict of circuits on this issue. In the case of *Garcia* v. *United States,* 373 F. 2d 806 (C.A. 10), the court expressed disapproval of the use of the term "unlawful entrapment" in instructions to the jury but saw no occasion to reverse the conviction. The decision recognizes that the issue of entrapment is for the jury.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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